Nos. 98-404 and 98-564

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Supreme Court of the United States

OCTOBER TERM, 1998

UNITED STATES DEPARTMENT OF COMMERCE, *et al.*,
Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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WILLIAM J. CLINTON, *et al.*,
Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

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REPLY BRIEF OF APPELLEES CITY OF LOS ANGELES, *ET AL.* IN SUPPORT OF APPELLANTS

I. STATISTICAL SAMPLING WILL PRODUCE THE MOST ACCURATE AND COST-EFFECTIVE CENSUS EVER TAKEN.

The House, Glavin-Appellees (collectively "Plaintiff-Appellees"), and several amici argue that statistical sampling will make the 2000 census less accurate than it would be otherwise. They are wrong. The only evidence introduced on the subject shows that using statistical sampling in the 2000 census will produce the most accurate and cost-effective census ever.

A. Using Statistical Sampling Increases the Accuracy of Non-Response Follow-Up.

The Glavin-Appellees announce — incorrectly — that "it is undisputed" that sampling for non-response follow-up ("NRFU") "decreases accuracy," Brief of Appellees, Matthew J. Glavin, *et al.* ("Glavin Br.") at 3 (emphasis omitted), and that "it is undisputed" that sampling during the NRFU "is less accurate than a traditional enumeration would be." *Id.* at 7. Not so.[1]

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[1] The Glavin-Appellees are fully aware that this factual issue is disputed, and their contrary claim misrepresents the record. After they made this same erroneous contention during argument to the district court, they were corrected. *See* City of Los Angeles, *et al.*, Intervenors' Supplemental Brief on Census Accuracy, Wedding Dresses, and "Actual Enumeration" at 2-5. In reality, the Glavin-Appellees had not contended this issue was

Statisticians and other census experts agree that using statistical sampling in the NRFU will increase the accuracy of the 2000 census. The National Academy of Sciences' Panel on Alternative Methodologies, the National Academy of Sciences' Panel on Requirements, the American Sociological Association, and the Government Accounting Office all support the use of sampling to improve accuracy. Joint Appendix in No. 98-404 ("House J.A.") at 53, 84 (*The United States Department of Commerce Bureau of Census, Report to Congress — The Plan for Census 2000* (revised and reissued August 1997) ("*Census 2000*")). As the National Academy of Sciences' Panel on Alternative Methodologies concluded:

> [W]e do not believe that a Census of acceptable accuracy and cost is possible without the use of sampling procedures, both for the [NRFU] and the integrated coverage measurement....

Id. at 89-90.

Using statistical sampling in the NRFU increases its accuracy in at least three ways. First, the object of the census is to determine how many people live in each area as of a single day: April 1, also known as the "decennial census date." 13 U.S.C. § 141(a). Because people constantly move from one area to another, the farther away in

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"undisputed" when they moved for summary judgment, but instead had themselves failed to dispute this fact: "[s]tatistical sampling will produce the most accurate and cost-effective census ever." City of Los Angeles, *et al.*, Statement of Genuine Issues Concerning "Material Facts" Included in Plaintiffs' "Statement of Undisputed Material Facts" at 19.

time from the census date the NRFU contact occurs, the more likely it is to be erroneous. Indeed, for this reason the NRFU was the "Achilles' heel of the 1990 Census." House J.A. at 362 (Declaration of Stephen Fienberg ("Fienberg Decl.") ¶ 12). "The further from the April 1 Census Day that data was collected, the more data quality declined and errors increased." *Id.* The NRFU planned for the 2000 census requires enumerators to visit fewer non-responding households. Thus, it will "reduce the time span over which the follow-up is conducted, reducing errors caused by a dynamic U.S. population." *Id.* at 363 (Fienberg Decl. ¶ 15).

Second, the more quickly the NRFU can be completed, the sooner the ICM can begin. "The longer the delay between Census Day and the ICM, the more respondents are likely to provide inconsistent responses (out of forgetfulness, or because of the continuous turnover in housing units — which affects approximately 150,000 housing units each month)." *Id.* at 89 (*Census 2000*).

Third, the Census Bureau will save about $400 million by not having to contact 10% of the non-responding households. *Id.* at 107-108 (*Census 2000*). It will use these savings to hire more qualified enumerators and provide them with better training. *Id.* at 89. Armed with better enumerators, the Census Bureau will obtain more accurate data and achieve greater accuracy. *Id.* at 363 (Fienberg Decl. ¶ 15).

Thus, the Glavin-Appellees' complaint that statistical sampling in the NRFU is "being done only to save time and money," Glavin Br. at 42, overlooks the fact that saving time and money will increase census accuracy. *See also id.*

at 378-379 (Fienberg Decl. ¶ 44) (rebutting Glavin-Appellees' contention that their position is supported by the GAO).

B. Post-Enumeration Adjustments Using Integrated Coverage Measurement ("ICM") Will Produce More Accurate Final Numbers.

1. ICM Is an Improved Method of Post-Enumeration Adjustment.

The ICM will correct for the error in the initial count of the population made through the mail campaign, door-to-door follow-up, and the NRFU sampling. House J.A. at 92-98 (*Census 2000*), 364-65 (Fienberg Decl. ¶ 17). To estimate the undercount, the ICM will employ dual system estimation ("DSE"). *Id.* at 96-98 (*Census 2000*). DSE is a well accepted, commonly used procedure. *Id.* at 365 (Fienberg Decl. ¶ 18). The Court is familiar with it already. *See Wisconsin v. City of New York*, 517 U.S. 1, 8-10 (1996). DSE has been employed in the past two censuses to evaluate data quality and has undergone substantial review and improvement by the Census Bureau, with extensive input from panels at the National Academy of Sciences and experts in statistical methods. House J.A. at 365-368 (Fienberg Decl. ¶¶ 21-23).

During the ICM, the Census Bureau will randomly select a nationwide probability sample of 25,000 blocks (or approximately 750,000 housing units). *Id.* at 94. Using specially-trained enumerators, the Census Bureau will count the households and household members in the sample blocks. *Id.* at 95. Then, for each of the 25,000 sampled blocks, the Census Bureau will use DSE to compare the results of the first count of the population (through the mail campaign and

the NRFU) with the results of the second count of the population (the ICM) for each of the sampled blocks. *Id.* at 96-98 (*Census 2000*), 366-77 (Fienberg Decl. ¶ 21). Through this process, the Census Bureau will determine which households and household members were erroneously included or excluded in the first numbers. *Id.* In the end, the ICM will produce a set of improved, *i.e.*, more accurate, counts for the 25,000 blocks that will then be applied to every block in the nation. *Id.*

In addition, the Census Bureau's use of DSE in the ICM phase is sophisticated enough to account for differential undercount rates, *i.e.*, those rates that differ based on certain demographic and geographic qualities of different blocks. One would not expect the DSE estimate of the net undercount rate for a block in the heart of Washington, D.C., for example, to explain or reflect the net undercount in Langley, Virginia. Accordingly, in selecting the ICM sample, the Census Bureau starts with a list of all the blocks (or equivalent-size rural units) in the United States, then groups blocks into categories (or "strata") according to both geography and demographics, such as racial composition, proportion of homeowners to renters, and average household size. *Id.* at 94-96 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). The undercount for each stratum is determined by measuring the undercount of a sample of blocks within the stratum by DSE. *Id.* The undercount rate of these blocks is then applied to the other blocks in that stratum. *Id.* The final step in the ICM consists of correcting the raw census count for each stratum to take into account estimated omissions and erroneous additions to that stratum. *Id.*

2. The Plaintiff-Appellees' Attacks on the ICM Are Unfounded.

The House claims that because of the ICM, "hundreds of thousands of people will be deleted from the census totals, and millions of imagined people who were never identified will be added." Brief for the United States House of Representatives ("House Br.") at 4. The House has it backwards. The ICM was developed precisely because traditional methods of enumeration have resulted for decades in tens of millions of people being erroneously added and omitted. House J.A. at 375-77 (Fienberg Decl. ¶¶ 39, 41). The 1990 Census, for example, *erroneously added 11 million persons* and *erroneously omitted 15 million persons*. *Id.* The ICM will rectify these errors. Absence of the ICM will insure that millions of Americans — especially children, renters, minorities, and the poor — will go uncounted.

The Glavin-Appellees also question the ICM's accuracy. They note that the ICM is based upon the 1990 Post-Enumeration Survey ("PES"), and that the Secretary ultimately decided not to use the PES to adjust the 1990 census results. Glavin Br. at 4. They disparage the ICM because the initial 1990 PES estimated undercount projection had to be revised downward from 2.1% to 1.6%. *Id.*

This argument is very misleading. First, the 1990 PES successfully captured a large percentage of the undercounted populations. *See* House J.A. at 367 (Fienberg Decl. ¶ 22); *see also* B. Edmonston and C. Schultze, eds., *Modernizing the U.S. Census*, Panel on Census Requirements in the Year 2000 and Beyond, Committee on National Statistics, National Research Council (National Academy Press, 1995); D. Steffey and N. Bradburn, eds., *Counting People*

in the Information Age, Panel to Evaluate Alternative Census Methods, Committee on National Statistics, National Research Council (National Academy Press, 1994).

Second, the revision to the 1990 PES resulted, in large part, from a computer error that had nothing to do with the soundness of the method.[2] Computer errors, of course, are not reserved for statistical sampling, but can occur in other more traditional census processes.

Third, major improvements will make the ICM more accurate than the 1990 PES. Most important, the sample size of the ICM will be *five times* as large as it was in the 1990 PES.[3] This significantly larger sample size "is large enough, and sufficiently representative, to estimate population totals for each state," thus ensuring greater accuracy. *Id.* at 94 (*Census 2000*). Another important difference is that in the 1990 PES, the strata *crossed* state lines, while in the 2000 Census ICM, separate strata will be established *within* each state. In addition, the use of "strata" for each state, not used in 1990, is also expected to produce greater accuracy in the ICM. *Id.* at 373 (Fienberg Decl. ¶ 35).

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[2] U.S. Dept. of Commerce, Bureau of Census, *Report of the Committee on Adjustment of Postcensal Estimates* 15 (Aug. 7, 1992) (attached as Exhibit E of Memorandum in Support of Motion of the City of Los Angeles, *et al.* to Intervene as Defendants (Apr. 3, 1998)).

[3] The 1990 PES gathered survey information from the inhabitants of approximately 5,000 blocks across the nation and the occupants of 150,000 households nationwide. The ICM, by contrast, will select 25,000 blocks and ultimately obtain information from the occupants of 750,000 housing units. House J.A. at 94 (*Census 2000*).

The Glavin-Appellees also wrongly assert that the ICM process is flawed because the Census Bureau has already "assumed" in determining the ICM post-strata blocks that some racial groups are "just as likely" to be counted as others. Glavin Br. at 49. This is wrong for several reasons. First, the strata that the Census Bureau will use have not yet been determined. *See* House J.A. at 92-98 (*Census 2000*). Second, the strata will group persons according to many characteristics, including, for example, age, location, proportion of homeowners to renters, and average household size — not just race. *Id.* at 94 (*Census 2000*), 372 (Fienberg Decl. ¶ 34). Finally, from a more technical standpoint, the Census Bureau is *not* assuming that certain persons have the same undercount rate as other persons, but rather that the undercount rates for different groups *are closer to one another than either is to the national net undercount*.[4]

C. The ICM Must Be Used for Such Purposes as Redistricting and Allocation of Federal Funds, Even if It Cannot be Used for Apportionment

Amici National Republican Legislators Association, *et al.* ("NRLA") claim it would be improper to use statistically adjusted census data for *redistricting* purposes because

[4] Apparently concerned that the post-strata might mix different ethnic or religious groups with each other, Glavin-Appellees worry that the Census Bureau is grouping "white Park Avenue socialites" with "Arabs and Hasidic Jews." Glavin Br. at 49, n.49. As explained above, however, this grouping may be proper since, for example, these groups may share similar demographic and geographic traits. House J.A. at 379 (Fienberg Decl. ¶ 46).

of the error rates. *See* NRLA Brief at 24-27. Citing block-level error rates from the 1995 test conducted by the Census Bureau, it concludes — without analysis — that "[i]f the lowest level data are suspect, equal population local representation districts cannot be drawn from this data." *Id.* at 26. Although these suits only challenge the use of sampling for *reapportionment*, not redistricting, NRLA's wrongheaded argument warrants a brief response.

The block-level error rate does not have any bearing on the accuracy of the census figures used for drawing congressional districts. House J.A. at 126-27 (*Census 2000*). "Calculations of average error for small blocks can be misleading to those unfamiliar with these statistics." *Id.* at 127; *see id.* at 123-126 (detailing why it is wrong to rely on block-level error rates). Thus, the error rate, if any, that is relevant to address the NRLA's concern for accuracy should be the error rate at the congressional district-level. If sampling is used, the Census Bureau estimates that average error rate will be only 0.6 percent, compared to an average error rate of 1.9% without sampling. *Id.* at 122 (*Census 2000*), 375-376 (Fienberg Decl. ¶ 40).

Although NRLA does not appear to understand statistical analysis, and therefore draws incorrect conclusions, its focus on redistricting highlights the need to require statistical sampling methods such as the ICM for such non-apportionment purposes as redistricting and allocation of federal funds, even if the Court prohibits their use for reapportionment.

As discussed in the Los Angeles-Appellees' opening brief at 46-49, because ICM and similar DSE methods would improve the accuracy of population data used for Congres-

sional redistricting — and eliminate the differential undercount of minorities and the poor — their use would advance compliance with the requirement of *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964), that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." And because the Secretary has determined that statistical sampling methods are feasible, their use for non-apportionment purposes is required by 13 U.S.C. § 195.[5]

In short, if this Court prohibits statistical sampling for apportionment purposes, its use will still be required for other purposes. This will result in a "two number census," one unadjusted and inaccurate for apportionment, the other

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[5] NRLA erroneously asserts that when Congress used "apportionment" in section 195, it intended to include intrastate redistricting in the term. NRLA Br. at 13-16. While it does not — because it cannot — cite any legislative history to support this departure from the statute's plain meaning, the NRLA, instead, cites numerous examples purportedly where the terms "apportionment and redistricting [were used] synonymously." *Id.* at 14-15. This Court, however, is not so confused about the difference between redistricting and apportionment. Indeed, it has "found this difference to be significant." *Wisconsin*, 517 U.S. at 13; see *Dept. of Commerce v. Montana*, 503 U.S. 442, 460 (1992). Further, this Court has noted significant legal differences among redistricting, apportionment, and the conduct of the census. *Wisconsin*, 517 U.S. at 18 ("[I]t is difficult to see why or how *Wesberry* would apply to the Federal Government's conduct of the census — a context even further removed from intrastate redistricting than is congressional apportionment.").

adjusted and far more accurate for redistricting and other purposes.[6]

D. Statistical Sampling Is Not Prone to Manipulation for Political Purposes.

The experts agree that statistical sampling will reduce the opportunity for political manipulation of the census. House J.A. at 128-132 (*Census 2000*). Since sampling has known, objective properties, it is preferable to the uncontrolled human error that results from a reliance on only traditional methods of enumeration. *Id.* at 129.

In addition, the Census Bureau has safeguards built into its plan for the 2000 census. *Id.* at 128-132. For instance, the Bureau's preparations for the 2000 census are being scrutinized by several blue-ribbon panels of statistical experts, including the 2000 Census Advisory Committee (consisting of 30 different professional governmental and non-governmental organizations), the Census Advisory Committee of Professional Associations,[7] and four different census advisory committees concerned with particular racial and ethnic populations. *Id.* at 56-57. Any attempt by one or more interest groups — inside or outside of the Bureau — to manipulate the census for political purposes is doomed to fail.

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[6] As noted in the Los Angeles-Appellees' opening brief, a "two number census" would be unlikely to include statistical sampling in the NRFU, but would include the ICM. Los Angeles-Appellees' Opening Brief at 48.

[7] This organization consists of the American Statistical Association, the Population Association of America, the American Economic Association, and the American Marketing Association.

Nonetheless, the Plaintiff-Appellees and some amici insist that the use of sampling will increase the risk of manipulation of the census. *See, e.g.*, House Br. 27, 48; Glavin Br. at 26 n.26, 49; Foundation Br. at 22-26. For instance, the Foundation claims "those charged with running" the 2000 census can manipulate the census figures because statistical sampling is based upon a set of "arbitrary assumptions."[8] Foundation Br. at 23. The Foundation, however, must admit that it has "no information" suggesting that the Census Bureau's staff will be coerced into manipulating any of its assumptions. *Id.* at 22.

Despite this admission, the Foundation won't let go. Like children around a campfire, the Foundation spins several scary stories that purportedly illustrate how the 2000 census could be manipulated. Like most such stories, they are pure fiction. For example, the Foundation constructs a hypothetical apparently designed to show that the ICM could be manipulated by local governments that, purportedly, "stand to reap huge rewards" by drumming up participation during the ICM phase. *Id.* at 28. The Foundation is way off base. The adjustment factors resulting from the ICM are not applied to the particular political subdivision where the sampled ICM block is located. Rather, they are applied to the block's entire stratum. House J.A. at 97-98 (*Census 2000*). Since each stratum spans an entire state and comprises hundreds or thousands of blocks, *id.* at 94, no single local

[8] The Foundation ignores the fact that these assumptions are based on two decades of research and empirical data and will be "locked in" well in advance of the 2000 census. House J.A. at 132 (*Census 2000*).

government could conceivably reap *any* reward whatsoever by manipulating the ICM in this manner.

II. SECTION 195 OF THE CENSUS ACT DOES NOT PROHIBIT SAMPLING FOR APPORTIONMENT.

The statutory arguments advanced by the House, Glavin-Appellees, and their amici mirror those made below, and were adequately refuted in the opening round of briefs. Two modest points, however, are worthy of additional response.

A. The General/Specific Statutory Analysis of Sections 141(a) and 195 Advocated by the House and Glavin Renders Section 141(a) Meaningless.

The Glavin-Appellees concede — as they must — that "[s]tanding alone, [section 141(a)] would authorize the Secretary to sample for all purposes encompassed in the 'decennial census of the population,' including determining the population number to be used for congressional apportionment." Glavin Br. at 26. So far, so good.

They — along with the House and their collective amici — then offer the construction of sections 141(a) and 195 shown in the table below:

Use of Sampling	§ 141 (a)	§ 195
Use of statistical sampling for apportionment	Secretary may use it in his discretion	Secretary may not use it
Use of statistical sampling for other purposes	Secretary may use it in his discretion	Secretary may use it in his discretion

Arguing that section 141(a) is "general" and section 195 is "specific," they conclude that section 195 controls. *See* Glavin Br. at 29; House Br. at 29.

But this construction, of course, renders section 141(a) mere surplusage. On the issue of the use of statistical sampling for apportionment, they say section 141(a) is trumped by section 195. And on the issue of the use of statistical sampling for all other purposes, they say the two statutes mean the same thing. Perhaps in recognition of this weakness, the House and Glavin-Appellees opine that section 141(a) really only contains "illustrative references to sampling of no substantive support [reflecting] Congress' modest intentions," and is nothing more than a little overlapping coverage that can be permissibly ignored. *See* House Br. at 30 & n.41; Glavin Br. at 40.

But the general/specific rule of construction is not intended to completely read the "general" section out of existence. Even the cases cited by the House and Glavin-Appellees make this abundantly clear. House Br. at 29 & n.40; Glavin Brief at 29 & n.30. For example, in *Morales v. Transworld Airlines, Inc.*, the Court found that a general

savings clause should not be applied where a specific section expressly dealing with preemption should be applied instead to preempt state consumer protection laws. 504 U.S. 374, 384-85 (1992). While the general savings clause was not applied, it still, however, had independent meaning that would be applicable in other circumstances not subject to preemption.[9]

"[T]he cardinal rule that, if possible, effect should be given to every clause and part of a statute" would itself be meaningless if the general/specific rule of construction could be applied to render general provisions nullities when other reasonable interpretations of the statute would save their meaning. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932).

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[9] Likewise, in *HCSC-Laundry v. United States*, the Court found a "general" provision, 26 U.S.C. § 501(c)(3), which defines charitable institutions that are tax exempt, did not apply to a laundry run by a non-profit hospital services organization ("HSO") because there was a specific statute that listed the types of HSOs eligible for tax exempt status. 450 U.S. 1, 6 (1981). Nonetheless, section 501(c)(3) would — and clearly does — control in other circumstances. Similarly, in *United States v. Giordano*, a general statute regarding the U.S. Attorney General's broad delegation authority was trumped by a specific statute strictly limiting that delegation authority when authorizing wiretaps. 416 U.S. 505, 512-14 (1974). The fact that the Attorney General did not have the broad authority to delegate authorization for the wiretaps, however, did not render the general statute superfluous.

B. Changes in the Secretary's Position on Section 195 Do Not Diminish the Deference Due to the Secretary's Interpretation of the Act.

The Plaintiff-Appellees seem to place great weight on the fact that the Secretary's position on the legality and constitutionality of the use of sampling for apportionment purposes has evolved over the last few decades. *See* House Br. at 24-27; Glavin Br. at 40-41 & n.38. Citing correspondence and hearings transcripts — much of which was not in the record below — the House attributes the Secretary's embrace of a purportedly "radical theory" for interpreting section 195 to the instant litigation. House Br. at 26 & n.36. This, according to the House, relieves the Court from deferring under *Chevron* to the Secretary's interpretation of section 195. *Id.* at n.36.

The House is wrong. This Court has upon rare occasion found an agency's reasonable interpretation of an ambiguous federal law undeserving of deference. However, it has only done so when the suspect interpretation is a "'post hoc rationalization' advanced by an agency to defend past agency action." *Auer v. Robbins*, 117 S. Ct. 905, 912 (1997). Here, the Appellants are not defending past use of sampling in the conduct of the census, so there is no past agency action to be justified after the fact. Merely because the "Secretary's interpretation comes to us in the form of a legal brief . . . does not, in the circumstances of this case, make it unworthy of deference." *Id.; see Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156 (1991); *see also National Wildlife Fed'n v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("[D]eference to an interpretation offered in the course of litigation is still proper

as long as it reflects the agency's fair and considered judgment on the matter."). Thus, under these circumstances, the Appellants' shift in position is wholly irrelevant.

III. THE PLAINTIFF-APPELLEES' CONSTITUTIONAL ARGUMENTS ARE UNPERSUASIVE.

A. Enumeration Just Means "Census."

Buried within a footnote is a significant concession by the House: "enumeration" is synonymous with "census." House Br. at 46, n.63. No one disputes that the Census Bureau intends to conduct a census in the year 2000. The constitutional issue, therefore, is a non-issue.

B. The Constitution Requires a Periodic Census Rather than a Particular Method of Ascertaining the Population.

Just as they did in the district court below, the Plaintiff-Appellees continue to make "historical" arguments that amount to little more than "junk history." Once again they erroneously contend that the "permanent & precise standard" that the Framers sought requires a certain method of conducting the census, when in fact, it had absolutely nothing to do with census-taking methods. *See* Glavin Br. 7, 50; House Br. 44, 48-49.[10]

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[10] The House has apparently recognized that they were on shaky historical ground below. Rather than quoting the "permanent & precise standard" language contained in the records of the Federal Convention, *see* 1 *Records of the Federal Convention of 1787* at 578 (Mason, July 11) (Max Farrand, ed. 1911), as they did in the district court, they have substituted their own wording, for example, "fixed, objective standard" (House Br. at 48) to stand for the same erroneous proposition.

As noted in the Los Angeles-Appellees' opening brief at 38-44, the "permanent & precise standard" urged by George Mason and ultimately adopted by the delegates was a periodic census of the inhabitants of the states. Congress was expressly given discretion to conduct the census "in such Manner as they shall by Law direct." U.S. Const. art. I, § 2, cl. 3.

C. The Framers Were Not Nor Could Not Be Opposed to Statistical Sampling.

The House makes the nebulous claim that Jefferson was "familiar with estimation." House Br. at 11. In the district court, however, the House was a little bolder. It claimed that Jefferson "was familiar with *methods of statistical* estimation." Memorandum for Plaintiff United States House of Representatives in Support of Its Motion for Summary Judgment at 12 (Apr. 6, 1998). Its retreat is no accident.

As the House learned in the district court, Jefferson could not have used statistical estimation because it was not yet available. House J.A. at 377 (Fienberg Decl. ¶ 42). Statistical estimation was probably first attempted by Pierre Simon LaPlace in 1783, who used ratio estimation to calculate France's population. *Id.* It was many years before LaPlace's idea would develop into the theory of statistical estimation and 160 years before it would be used again in a census context. *Id.* Jefferson could not have used probability sampling methods because they were not developed for another 120-130 years. *Id.* When Jefferson "estimated" Virginia's population in 1782, he was making an educated guess based on his limited information. Thus, the reason why "no one suggested that Congress 'augment' the census

with statistical estimation," House Br. at 49, in the Framers' day is because this method did not yet exist.

IV. CONCLUSION

For all the reasons stated above, the judgments of the district courts should be reversed.

Respectfully submitted,

Dated: November 17, 1998

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